U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 192 51119 Office: CALIFORNIA SERVICE CENTER Date: OCT 12 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an electronic manufacturer. It seeks to employ the beneficiary permanently in the United States as an electronic parts production supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, counsel submits a statement.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for

processing by any office within the employment system of the Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on January 15, 1998. The proffered wage as stated on the Form ETA 750 is $21.66 per hour, which equals $45,052.80 per year. The Form ETA 750 states that the position requires two years experience in the job offered.

With the petition, counsel submitted a letter, dated January 13, 1998, on the letterhead of AFC Industries of Lancaster, California, and signed by the company's office manager. That letter states that that company employed the beneficiary from August 1995 to the date of the letter. The letter further states that the beneficiary supervised workers manufacturing electronic parts. Counsel also submitted the first page of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. That return states that the petitioner declared taxable income before net operating loss deduction and special deductions of $38,120 during that year. Finally, counsel submitted the petitioner's unaudited financial statements for the first half of 2001.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to show, consistent with the requirements of 8 C.F.R. § 204.5 (l)(3)(ii), that the beneficiary has the requisite two years work experience, the California Service Center, on August 14, 2002, requested evidence pertinent to both of those issues.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence of the petitioner's ability to pay the proffered wage include copies of annual reports, federal tax returns, or audited financial statements and demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Consistent with the requirements of 8 C.F.R. § 204.5(l)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. The Service Center also requested that the employment verification letter should state the dates of the beneficiary's previous employment and the number of hours the beneficiary worked per week.

In response, counsel submitted the petitioner's 1998, 1999, and 2001 Form 1120 U.S. Corporation Income Tax Returns. Counsel also submitted a copy of the previously submitted employment verification letter and another copy of the first page of the petitioner's 2000 tax return. Finally, the petitioner submitted unaudited financial statements for the first half of 2001.

The 1998 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $31,450 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $585,823 and current liabilities of $256,571, which yields net current assets of $329,252.

The 1999 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $30,991 during that year. The corresponding Schedule L shows that at the end of that

year the petitioner had current assets of $890,668 and current liabilities of $530,929, which yields net current assets of $359,739.

The 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $38,120 during that year. Because the petitioner did not submit its 2000 Schedule L, this office is unable to compute its net current assets at the end of that year.

The 2001 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $31,119 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $677,336 and current liabilities of $258,908, which yields net current assets of $418,428.

The director denied the petition on February 5, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience.

On appeal, counsel asserts that the petitioner has demonstrated its ability to pay the proffered wage. Counsel stressed the petitioner's gross profit, compensation of officers, wages paid, and retained earnings. Counsel also stated that the petitioner had demonstrated that the beneficiary is qualified for the proffered position.

Counsel's reliance on the expenses paid by the petitioner as evidence of its ability to pay the proffered wage is misplaced. Counsel offered no evidence that the petitioner's compensation of officers or wages paid to employees were funds available to pay the wage proffered to the beneficiary. Further, the petitioner's gross profit is clearly not a fund available to pay the proffered wage.

Showing that the petitioner's gross receipts or gross profit exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses or otherwise increased its net income, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

The financial statements for the first half of 2001 clearly state that they were not produced pursuant to an audit. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the unsupported representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to

pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant,* 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is $45,052.80. The priority date is January 15, 1998.

During 1998 the petitioner declared taxable income before net operating loss deduction and special deductions of $31,450. That amount is insufficient to pay the proffered wage. The petitioner had net current assets, however, of $329,252. The petitioner has demonstrated the ability to pay the proffered wage out of its net current assets during 1998.

During 1999 the petitioner declared taxable income before net operating loss deduction and special deductions of $30,991. That amount is insufficient to pay the proffered wage. The petitioner had net current assets of yields net current assets of $359,739. The petitioner has demonstrated the ability to pay the proffered wage out of its net current assets during 1999.

During 2000 the petitioner declared taxable income before net operating loss deduction and special deductions of $38,120. Because the petitioner did not submit its 2000 Schedule L, this office is unable to compute its 2000 year-end net current assets at the end of that year. The petitioner did not demonstrate that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of $31,119. That amount is insufficient to pay the proffered wage. The petitioner ended the year, however, with net current assets of $418.428. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

The petitioner did not submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000. Therefore, the petitioner has not demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

Further, the employment verification letter submitted does not state the beneficiary's title or the number of hour he worked per week. The omission of the beneficiary's job title means the evidence does not satisfy the requirements of 8 C.F.R. § 204.5(l)(3)(ii). The omission of the number of hours the beneficiary worked per week means that the evidence does not demonstrate that the employment was full-time. The petitioner has not established that the beneficiary is eligible for the proffered position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.